

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Eighteenth Region

DICKEY RURAL TELEPHONE  
COOPERATIVE d/b/a DICKEY RURAL  
NETWORKS (DRN)<sup>1</sup>

Employer

and

COMMUNICATIONS WORKERS OF  
AMERICA, LOCAL 7303

Union/Petitioner

Case 18-UC-372

**DECISION AND ORDER**

The Union/Petitioner filed this petition and asks that I find that the network services consultant (NSC) employed by the Employer should be in the existing collective bargaining unit represented by the Union at the Employer's Ellendale, North Dakota facility. The Employer contends that the NSC position should be excluded from the bargaining unit on the basis that it is a professional, confidential and/or guard position. Based on an administrative investigation, I conclude that the bargaining unit should be clarified to include the NSC position. The bases for my conclusion is that the NSC is not a professional, confidential or guard position, as contended by the Employer,

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<sup>1</sup> The Employer is described herein by its correct name.

and that the NSC shares an overwhelming community of interest with other bargaining unit positions.

Under Section 3(b) of the Act, I have the authority to decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>2</sup>

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. In order to understand my conclusion that the NSC should be included in the unit, I will first summarize the collective bargaining relationship between the Employer and Union, and then present a synopsis of the Employer's operation. I will then analyze the NSC position and compare it to other unit positions. The section titled "Community of Interest" will analyze current Board law as well as the evidence suggesting the NSC shares a community of interest with other unit positions. Finally, the remaining sections of the decision prior to the order will analyze each of the Employer's contentions that the NSC position is professional, confidential or a guard.

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<sup>2</sup> The Employer, Dickey Rural Telephone Cooperative d/b/a Dickey Rural Networks (DRN), is a North Dakota corporation with an office and principal place of business located in Ellendale, North Dakota. The Employer provides local, long distance and internet telecommunications services to customers located in North and South Dakota. During the past calendar year, a representative period, the Employer purchased and received at its Ellendale, North Dakota facility goods and services valued in excess of \$50,000 directly from sources and suppliers located outside the State of North Dakota, and earned gross revenues in excess of \$1,000,000.

## **THE COLLECTIVE BARGAINING RELATIONSHIP**

On April 13, 1966, the Union was certified as the collective bargaining representative of certain employees of the Employer. The Employer and Union have been parties to successive collective bargaining agreements. The current contract's term is January 1, 2001 to December 31, 2003. The contract, at Article 1 Recognition, provides as follows:

The Union having been certified by the National Labor Relations Board, 18-RC-6722, the Company hereby recognizes the Union as the exclusive collective bargaining representative for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment for all its employees as one bargaining unit, but excluding guards, confidential employees and professional and supervisory employees as defined in the Labor Management Relations Act of 1947, as amended.

Starting in February 2002, during the term of the current contract, the Union sought the inclusion of the NSC in the bargaining unit. However, the Employer refused to agree to the Union's request, and the parties were not able to reach agreement.

## **THE EMPLOYER'S OPERATION**

The Employer provides local, long distance, and internet telecommunications services to its customers. The Employer employs about 35 non-supervisory employees at its Ellendale, North Dakota facility, with about 27 employed in bargaining unit positions. The facility consists of a single one-story building, although the Employer plans to expand it. The Employer's General Manager is Darren Moser. Reporting to him are three department managers: James Byerley (Plant Manager), Troy Schilling (Office Manager), and Nadine Olson (Information Services Manager). Byerley supervises 15 of the bargaining unit employees, who are employed as construction

techs, outside plant techs, and central office techs. Schilling supervises nine bargaining unit employees who are employed as special services clerk, billing clerk, receptionist and building service attendant. The special services clerk position is a customer service function. Schilling also supervises three non-unit accountants. In the Information Systems Department, Olson supervises three bargaining unit employees employed in the classification of plant records clerk. These three individuals are Linda Ellsworth, K. C. Kuno and Peggy Olson, and they work in a cubicle area just outside of Krueger's office. Olson also supervises three non-unit employees employed in marketing/advertising/public relations positions, one person in data processing, the NSC, and two summer interns.<sup>3</sup>

#### **THE NSC AND ITS RELATIONSHIP TO OTHER POSITIONS**

The investigation revealed that the Employer created the position of NSC in April, 2001. It sought applicants throughout its system via a single-page "Position Opening" announcement, and through newspaper advertisements. It did not follow the procedures in the contract and post the position internally as a bargaining unit position. However, it did post a copy on the bulletin board in the lunchroom at the office. An applicant not employed by the Employer, Kristi Krueger, was hired in September 2001 to fill this position.

A formal job description does not exist for the NSC position. However, the job duties, qualifications and "advanced network training" requirements are listed on the Position Opening announcement. The primary job duties listed are to (a) sell, configure

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<sup>3</sup> These individuals are enrolled in 4-year degree programs in MIS and Computer Science.

and support the Employer's business digital data services; (b) support the Employer's internet (dial up and digital subscriber line) customers; (c) configure/support the Employer's internal networks (both local-area network and wide-area network); (d) sell and provide network for Employer customers as contracted; and (e) manage, troubleshoot and support Employer networks and employee and customer helpdesk operations. The required qualifications, skills, and advanced network training listed in the announcement are knowledge/experience with (1) Cisco Routers and networking protocols, (2) Microsoft NT, Windows and AIX or UNIX, (3) Microsoft Office Applications, (4) ODBC and SQL servers, (5) Web Server, Internet Mail, DHCP and DNS, (6) Web design, and (7) PC hardware. The announcement does not indicate that any special certifications are required for the job, such as Novell, Cisco, or Microsoft, or that a 4-year degree in any specialized field of study, such as Management Information Systems or Computer Science, is required.

Before Krueger accepted the NSC position she worked as a waitress. She had taken classes in a 2-year Associate of Arts Microcomputer Specialist program at the North Dakota State College of Science located at Wahpeton, ND. She received an Associates in Applied Sciences (A.A.S) degree. However, she does not have any software certifications.

The only other person who performs the NSC duties is Krueger's supervisor, Information Services Manager Olson.

Krueger's is salaried. Her starting salary was the equivalent of about \$10 an hour. After completing a 3-month probationary period, her salary was raised to the equivalent of \$12.31 per hour. After receiving another raise effective July 2, 2002, her

current pay rate is the equivalent of \$13.08 an hour. According to the 2002 “Salary Schedule” attached to the labor agreement, this figure is less than the wage range of the top two bargaining unit classifications, at the low-end of the range of three other classifications and at the mid-range of two other classifications, and is higher than one classification.

Krueger is paid time and one half for hours worked in excess of eight per day and 40 per week. She receives the Employer’s medical, dental, eye and life insurance benefits, with the Employer paying the premium. This differs from what bargaining unit employees receive only to the extent that they pay 10% of the cost of such insurance. She receives sick pay based on the number of hours worked, but it is unclear whether there is a cap on the number of hours she can accrue each year. Unit employees accrue 16 sick days a year regardless of the number of years of service. Krueger is eligible for a one-week vacation after she has worked a year, and it appears that she receives the same paid holidays and vacation accrual benefit as bargaining unit employees. All employees receive free local home telephone service and dial-up Internet service.

Krueger’s work hours conform with the Employer’s normal business hours of Monday through Friday, 8 a.m. to 5 p.m. These are also the hours for bargaining unit employees. When Krueger’s job takes her off-site to customer locations, which is frequent, she normally uses a company vehicle. She gets reimbursed for mileage when she uses her own vehicle. When summer interns are employed, Krueger shares with them a small office in the Information Services department.

The Employer characterizes Krueger's job functions as providing hardware and software support to customers and its own employees in regard to servers and local area networks, maintaining in-house servers, local area networks and personal computers. According to the Employer, to perform these functions, Krueger needs knowledge/skills in networking, hardware operations, software functions, security information, and data technologies and operation. The Employer contends that Krueger's work time is spent approximately in the following manner: 65% on sales of networks and advanced Internet and network services to new customers, 20% on internal local area network/wide area network support (including security), and 15% on current network assignments. On the other hand, Krueger's description of her duties reveals that she is primarily responsible for setting up Employer and customer e-mail accounts limited to password problems, troubleshooting computer problems, and working at the customer service desk handling customer complaints and requests<sup>4</sup>. The Employer and Krueger agree that Krueger does not have the password to the Employer's "Firewall" security system, a system designed to prevent unauthorized access to or from a private network.

Krueger has frequent daily contact and interaction (a) with the plant records clerks regarding customer trouble and dispatch issues; (b) with the special services clerks and general clerks for new customer services or changes in services, and remedying customer complaints; (c) with the billings clerks to coordinate customer billings; (d) with the outside plant techs regarding customer service installation matters;

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<sup>4</sup> The Employer contends she should not be spending any time in customer services performed by the "special services clerks", who are basically service order takers. She does, however, provide information to them for use in their jobs and vice-versa.

and (e) with central office techs for circuit installations and troubleshooting activities.

On field assignments at customer locations, Krueger works with the outside plant techs on customer satellite service installations, where she installs network cards in customer computers, while the outside techs install the appropriate wiring for DSL service.

The special services clerks, a bargaining unit position, take orders for local telephone service, calling features, cable television service and dial-up Internet service. The services are generally standardized. The clerks are to make suggestions about the advantages and features of the services. These duties are performed from a call center at the facility. The NSC position travels to the client's location and works with the client to develop an individualized network system that may require the client to purchase additional hardware or software and the appropriate mix needed to meet the client's needs. The NSC interacts with and provides information to the special services clerks as needed.

Insofar as unrepresented employees at the Ellendale facility are concerned, the three salaried accountants are, according to the Employer, professional employees who report to Office Manager Schilling. There are also three marketing/advertising, public relations positions. The Employer contends that these positions are professional and confidential. All three positions require four-year degrees. The Employer describes the part-time marketing/pr executive job as focused on press releases and corporate image advertising; the full time marketing executive job as focused on residential product advertising and market research; and the part time business account executive job as focused on interaction with other businesses, as well as civic and governmental groups,



defining needs and promoting economic development and growth. All three share an office adjacent to the plant dispatch cubicle area. Finally, the remaining unrepresented position (excluding the interns) is the data processing manager. The Employer contends that the position is managerial, confidential and professional. This position is in the Information Services Department. Neither a job description nor position opening announcement exists for this position, according to the Employer.

Krueger has minimal interaction with the data processing manager. However, the Employer maintains that Krueger is an integral part of the “sales team” focusing on networks and data systems sales, and that the marketing positions assist in developing materials that Krueger uses in her efforts to induce clients to utilize the Employer’s network products and services.

### **COMMUNITY OF INTEREST**

Typically, the Board looks to various factors in determining whether a new group of employees or a new position should be added to an existing bargaining unit through unit clarification or other representation proceedings. Among the factors considered are compensation, work hours, supervision, qualifications, skills, training, job functions, location, work contact, integration, interchange, and bargaining history. Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962). The Board also looks to the role of the new employees in relationship to the operations of the existing unit. Granite City Steel Co., 137 NLRB 209 (1962). It is also clear, however, that the Board follows a restrictive policy in finding accretion because it forecloses the employees’ basic rights to select their own bargaining representative. Towne Ford Sales, 270 NLRB 311 (1984). Therefore, accretion is not applicable to situations in which the group sought to be

accreted would constitute a separate appropriate bargaining unit. Passavant Health Center, 313 NLRB 1216 (1994). Therefore, the Board will find a valid accretion when the extended recognition involves employees who have little or no separate group identity and when the additional employees share an overwhelming community of interest with the pre-existing unit. Super Valu Stores, 283 NLRB 134, 136 (1987); Safeway Stores, 256 NLRB 918 (1981).

In view of the foregoing, I find that, assuming the NSC position is not a professional or confidential employee, or a guard, the evidence satisfies the Board's restrictive test in finding accretion. I do so because the unit description is clear – all employees are included in the unit – unless they are professional or confidential employees, or guards. Moreover, the NSC position shares a close community of interest with bargaining unit employees in that the pay, supervision, interaction and functional integration all support a conclusion that the NSC and remaining unit employees share a community of interest. It appears that even the Employer does not contend that the NSC should be excluded from the unit because she lacks a community of interest with remaining employees. Therefore, I will next analyze the Employer claims regarding the professional, confidential and guard status of the NSC.

### **PROFESSIONAL EMPLOYEE ISSUE**

The statutory definition of “professional employee” is provided in Section 2(12) of the Act. The term “professional employee” means:

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine, mental, manual, mechanical or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine, manual or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)."

The Board has applied the statutory definition of professional to jobs in dispute on a case-by-case basis to determine whether or not any of the above indicia of professional status are present. The controlling factor is generally the character of the work required of the position, rather than the individual employee's qualifications. Avco Corp., 313 NLRB 1357 (1994).

The NSC job requires that Krueger review existing data networking infrastructure at customer sites, analyze its performance, interview and summarize customer objectives, identify key component network items, and provide a recommendation to the customer. Neither Kruegers' qualifications nor the work required in the NSC position meet the requirements of Section 2(12) above. She neither possesses, nor does the NSC job require, a four-year degree in a field of scientific endeavor. The person to occupy the NSC position is not required to have "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning" as required by

Section 2(12)(a)(iv). The Employer's hiring practices do not require the person to hold degrees of any kind. Moreover, the evidence does not suggest that the work is "predominantly intellectual and varied" or involves "the consistent exercise of discretion and judgment" as required under Section 2(12)(a)(i) and (ii) of the Act. See, Greenhorn & O'Mara, Inc., 326 NLRB 514, 517 (1998) (to be a professional, individual must satisfy each of the four requirements of Section 2(12); Arizona Public Service Co., 310 NLRB 477, 482 (1993) (reactor operators who are highly specialized not professional); Chesapeake Telephone Co., 192 NLRB 483 (1971) (engineering assistants who use some judgment and discretion in work not professional because they utilize practices established by the Employer).

### **CONFIDENTIAL EMPLOYEE ISSUE**

"Confidential employees" are defined as employees who assist and act in a confidential capacity to persons who formulate determine, and effectuate management policies with regard to labor relations, or regularly substitute for persons having such duties. B. F. Goodrich Co., 115 NLRB 722, 724 (1956). It is the confidentiality of such a relationship with a managerial-type person who formulates/determines/effectuates labor relations policies that is determinative, rather than the confidentiality of the information. Greyhound Lines, 259 NLRB 477, 479-80 (1981). Lastly, the party asserting confidential status has the burden of proof. Crest Mark Packing Co., 283 NLRB 999 (1987).

At the Employer, the management person most involved in labor relations matters is Darren Moser. It is unclear who participated on the Employer's contract negotiating team for the current contract or who, aside from Moser, is involved in

contract administration and grievance handling matters. While Moser does not have a personal secretary, Krueger has not participated in any labor relations activities in her NSC position, nor assisted in a confidential capacity to Moser or any other manager.

According to the Employer, Krueger has access to e-mails (both in and out of the system), financial and payroll information, personnel files, and internal documents regarding disciplinary decisions and other bargaining unit issues, and she will have future access to the minutes of contract negotiating sessions and grievance investigation reports. Krueger testified, however, that to date she has not had access to anything but the e-mails and has not had the need to access or be involved with the remaining information. She cannot access employee or customer e-mails.

In any event, mere access to personnel records, or financial or confidential business information, or to labor-related confidential material is not enough to confer confidential employee status. Lincoln Park Nursing Home, 308 NLRB 1160 (1995); Brodart, Inc., 257 NLRB 380, 384 fn. 1 (1981); Greyhound Lines, supra. Even computer access to confidential labor relations information via either access code or hacking is not sufficient to confer confidential-employee status. Ryder Student Transportation, 336 NLRB No. 78 (2001). Finally, the Board has long held that those who may at some time in the future function as confidential employees but who are not doing so at the time of determination is made do not meet the definition of confidential employee. American Radiator & Sanitary Co., 119 NLRB 1715, 1720-21 (1958). The evidence fails to establish that the NSC position acts and assists in a confidential capacity to any person who formulates, determines and effectuates management policies with regard to labor relations, or regularly substitute for employees who have such duties. Inland Steel

Company, 308 NLRB 868, 873 (1992) (information support technicians and data specialist compensation technicians not confidential even though they have access to statistical information used by employer in collective bargaining or that may be used for strategic planning as it relates to department shutdowns; accounting employees not confidential in spite of access to department budgets, incentive and bonus information, product and profit figures).

### **GUARD ISSUE**

To be a guard within the meaning of the Act an employee must enforce an Employer's work rules to (a) protect company property against employees and other persons, and (b) ensure the safety of such persons. Petroleum Chemicals, 121 NLRB 630 (1958). The Board holds that to qualify as guard under this section, employees must perform security functions involving the protection of an employer's property as an essential part of their duties and that those security functions must encompass traditional police and plant security functions (e.g., patrolling) as a major and continual part of their job duties. Inland Steel Company, 308 NLRB 868, 871-72 (1992).

In the instant case, the Employer argues that this concept should be extended or accorded to the NSC position since it requires security duties in the context of working with the Employer's computer system. According to the Employer, Krueger has open access to the entire data storage, delivery network and electronic functionality of the Employer, which includes highly critical or potentially crippling data information for both the Employer's employees and customers; and that she is responsible for the security of the sensitive data in the Employer's computer network. However, even assuming that Krueger does have such access, which she denies she has had to date, responsibilities

limited to maintaining the security of the computer system are not sufficient to confer guard status. Inland Steel Company, supra. Moreover, in the instant case, Krueger does not have access to the Employer's "firewall" code. If she doesn't have the password she can't administer the firewall, and therefore, her security duties would appear to be limited.

### **ORDER**

**IT IS HEREBY ORDERED** that the unit, exclusively represented for purposes of collective bargaining by Communications Workers of America, Local 7303, be and it hereby is clarified to include the network services consultant employed by the Employer in and out of it Ellendale, North Dakota facility.<sup>5</sup>

Signed at Minneapolis, Minnesota, this 15<sup>th</sup> day of November, 2002.

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Ronald M. Sharp, Regional Director  
Eighteen Region  
National Labor Relations Board  
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<sup>5</sup> Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 – 14<sup>th</sup> Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by **November 29, 2002**.